5-13-2015

Viken Securities Limited, Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Partial Summary Judgement as to Counts I & II

Melvin K. Westmoreland
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

VIKEN SECURITIES LIMITED, a foreign corporation, FELIPE SECURITIES LIMITED, a foreign corporation, VEENA MIRCHANDANI, and SONIYA MIRCHANDANI,	)	
Plaintiffs,	)	Civil Action No. 2014cv250215
v.	)	
NAVIN DADLANI,	)	
Defendant.	)	

Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Partial Summary Judgment as to Counts I & II

This matter is before the Court on Defendant Navin Dadlani's Motion for Summary Judgment and Plaintiffs' Motion for Partial Summary Judgment as to Count 1 and II of Plaintiff's August 15, 2014 Renewed Complaint. Upon consideration of the briefs and materials submitted on the Motion, oral argument of counsel and the record of the case, this Court finds as follows:

Starting in approximately 2005, Plaintiffs invested millions of dollars in an investment fund called Vision Opportunity Fund (the "Vision Fund") through an offshore investment vehicle called Tiberius BVI, a company incorporated in the British Virgin Islands. Tiberius BVI was founded by Navin Dadlani and he was originally the sole shareholder until November of 2005 when he transferred all his shares to his grandmother. The shares are now held by Peach Trust, whose ultimate beneficiaries are Mr. Dadlani's father and one other entity. The Vision Fund was owned and operated by two friends and colleagues of Mr. Dadlani, Randolph Cohen and Adam Benowitz. Mr. Dadlani was not and is not an officer or director of Tiberius BVI or Vision Fund.

There is no evidence Mr. Dadlani had authority to act on behalf of Tiberius BVI or Vision Fund, specifically in 2009 and 2010. The evidence shows Plaintiffs were represented in the Tiberius investment negotiations by Suren Mirchandani, who is not a party to this suit.[1] Suren was also authorized by his father BK to act on behalf of Felipe and Viken in matters related to investment deals with Mr. Dadlani and the subsequent law suits. BK and Veena are not officers, directors, employees or trustees of Viken or Felipe.

Plaintiffs entered into investment agreements with Tiberius allowing Tiberius to manage Plaintiffs' investments and enter transactions on the investors' behalf and they were aware their money would be invested by Tiberius in the Vision Fund. Mr. Dadlani was not paid for investment advice by either Tiberius BVI or Plaintiffs. In March 2009, Plaintiffs received notice the Vision Fund had stopped paying out redemption requests or had "gated." As a result, Plaintiffs lost millions of dollars. Following the loss, Suren and the other Plaintiffs claimed Navin Dadlani led them to believe the investments with Tiberius were "risk-free" and that Plaintiffs could not lose money.

On October 9, 2009, Mr. Dadlani and Veena both signed a written contract (the "2009 Contract"). Veena testified she entered into this agreement "so that the family would stay together." The 2009 Contract says:

> This Agreement is made between Mrs. Veena Bhagwan Mirchandani (Mrs. Mirchandani) and Mr. Navin Dadlani (Mr. Dadlani). Mr. Dadlani was entrusted with USS 8 million borrowed against 81 Avenue Road property and a further investment of approximately USS 20 million which is presently valued at USS 14.5 million.

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[1] Plaintiff Veena Mirchandani's husband, BK Mirchandani, and her son (Navin Dadlani's cousin), Suren Mirchandani, are non-parties but it appears that BK was the source of much of the family's wealth and that his son, Suren, acted as a financial advisor for the family members and the corporate entities in which the family members had a stake. BK was the ultimate beneficiary of the trust that owns Plaintiffs Viken and Felipe. For clarity, the Court will refer to the Mirchandanis by first name.

Mr. Dadlani undertakes to repay USS 8 million borrowed against 81 Avenue Road to ABN Amro Bank, Jersey latest by 31st December 2009 or earlier and redeem the original Title Deeds and hand them over to Mrs. Mirchandani.

The other investment which presently stands valued at USS 14.5 million will be repaid within twelve months from date hereof with an amount of USS 18 million, yielding an annual return of 25%. Any profit over and above 25% per annum will be added to the principal amount of investment.

Mr. Dadlani is personally responsible for the repayment of both the aforesaid investments.

Further investments i.e. Guardian Fund or any other fund recommended by Mr. Dadlani will be considered favorably by Mrs. Mirchandani.

It is undisputed Mr. Dadlani did not make any payments though there is evidence Tiberius paid Felipe and Viken some money after the execution of the 2009 Contract.

On March 17, 2010, Veena and Mr. Dadlani entered into another contract (the "2010 Contract"). The 2010 Contract says:

Agreement Reached Between Mrs. V.B. Mirchandani and Navin Dadlani:

1. The repayment schedule to both Viken and Felipe that was agreed between Suren Mirchandani and Navin Dadlani will remain. The schedule will be attached to this document.

2. Navin will ensure that Felipe is paid off as per the schedule. However, in order to securitise the repayment of Felipe, the Peach Trust agrees and will immediately sign a letter of irrevocable transfer to ABN Amro indicating that the proceeds of the sale of Navin's flat at Prince Albert Road will be used to pay down the Felipe loan.

3. Navin will also explore and ensure that an irrevocable letter of wishes is given to the Peach Trust by the Settlor indicating that in the event of a default by Navin in repayment of the Felipe loan, ownership of Tiberius will move to Viken or any other entity acceptable to Mrs. VBM. In other words, the shares of Tiberius will be transferred to Viken. Once Felipe is fully repaid this letter of wishes will be torn up. If this letter of wishes cannot be put in place, then Navin will work with Ron and Paul to find another way to securitise the Felipe investment by way of making VBM or Viken the owner of Tiberius.

4. Tiberius also owes Mrs. V B Mirchandani and Soniya Mirchandani the approximate sum of USD 3.6 M that is to say USD 2M to Soniya and USD

> 1.6M at this time to Mrs. VBM. Tiberius guarantees that it will pay Soniya a minimum of GBP 500,000 by the end of March 2011. Apart from this, any funds that come from redemptions on Soniya and Mrs. VBM's account in this year and the following years will be paid to them both.

Mr. Dadlani and Veena are signatories to the 2010 Contract and Suren signed as a witness. There is no indication on the face of the Contract that Veena or Suren was signing on behalf of Felipe or Viken or that Navin was signing on behalf of the Peach Trust or Tiberius. Again, there is no evidence that any payments were ever made under the 2010 Contract. On May 26, 2010, Paul Reed, the trustee of the Peach Trust, sent Veena a letter about the 2010 Contract informing her that Mr. Dadlani had no authority to bind Tiberius BVI or any of its shareholders in any way.

In February of 2011, Plaintiffs filed an action in the UK against Mr. Dadlani. In October of the same year Suren agreed, in exchange for Mr. Dadlani's cooperation, to "hold [Dadlani] harmless against any claims that may be brought against you as a consequence of the truthful cooperation." In November, Mr. Dadlani was interviewed by Mr. Oliver in an effort to assist Plaintiffs in investigating the prospects of recovering as much money as possible for the family and the UK lawsuit was allowed to lapse. Viken also sued Tiberius in the British Virgin Islands, but this suit was dismissed in January of 2013. The current claims were filed on August 15, 2014.

Summary judgment should be granted when the movant shows "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." O.C.G.A. § 9-11-56(c). To avoid summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial." § 9-11-56(e). "Supporting and opposing affidavits shall be made on personal knowledge" and "shall set forth such facts as would be admissible in the evidence." *Id.* The

Court views the evidence in the light most favorable to the nonmoving party. *Morgan v. Barnes,* 221 Ga. App. 653, 654 (1996).

I. Breach of the 2009 Contract

Mr. Dadlani asserts the 2009 Contract is unenforceable because the agreement lacks clear identity of parties, bargained-for consideration or signatures of the claimed parties and, therefore, Plaintiffs Veena Mirchandani and Felipe Securities' claim for breach of the 2009 Contract fails as a matter of law. "To constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate." O.C.G.A. §13-3-1.

A. The 2009 Contract Lacks Bargained-For Consideration.

Mr. Dadlani argues that the 2009 Contract fails for lack of consideration. The only return promise expressly made in the 2009 Contract is Veena's promise to favorably consider future investments recommended by Mr. Dadlani. However, this is insufficient consideration because it is an illusory promise. *Kemira, Inc. v. Williams Investigative & Sec. Servs., Inc.*, 215 Ga. App. 194, 198 (1994) ("Words of promise which by their terms make performance entirely optional with the 'promisor' whatever may happen, or whatever course of conduct in other respects he may pursue, do not constitute a promise.").

Plaintiffs argue the consideration bargained for was Plaintiffs' promise to (1) forego legal action against Mr. Dadlani and Tiberius BVI; (2) discount the amount to be repaid to Plaintiffs for their investments; and (3) give Mr. Dadlani and/or Tiberius more time to repay. While Plaintiffs argue Dadlani was acting as an agent of Tiberius, Veena testified she viewed the agreement as between her and Dadlani only, and not as an agreement with Tiberius, and Tiberius is not a party to this action.

As an initial matter, the Court is not persuaded that benefits under a promise running to Tiberius are valid consideration in a contract purporting to bind Mr. Dadlani since Mr. Dadlani is not an officer or director of Tiberius and Plaintiffs' investment agreements were with Tiberius and not with Dadlani personally.[2] Likewise, the Court is not persuaded by Plaintiffs' argument that Mr. Dadlani ultimately benefitted from a forbearance to sue Tiberius because his father was the ultimate beneficiary of the Trust that owned Tiberius and family wealth means Mr. Dadlani is wealthy. This purported personal benefit to Mr. Dadlani is far too tenuous. Therefore, any bargained-for benefit to Tiberius BVI (i.e., extension of time to repay, discount on amount to repay, forbearance from filing law suit) would not be valid consideration for a promise for Mr. Dadlani to personally repay the debts of Tiberius.[3]

As to Plaintiffs' assertion they were foregoing their right to sue Mr. Dadlani personally, the Court is unpersuaded this implied promise was sufficiently definite from the face of the contract. "[I]n construing a contract, courts 'must look to the four corners of the document' and cannot consider parol evidence unless there is an ambiguity that cannot be resolved by employing the rules of contract construction." *Lee v. Choi*, 754 S.E.2d 371, 376 (Ga. Ct. App. 2013) (quoting *DeKalb County v. City of Decatur*, 297 Ga.App. 322, 325 (2009)). "Forbearance [to bring an action], to constitute legal consideration, must be such as will tie the creditor's hands for a definite time established between the parties." *Ballentine Motors of Ga., Inc. v. Nimmons*, 93 Ga. App. 708, 709 (1956); see also *Trust Co. of Columbus v. Rhodes*, 144 Ga App 816, 818 (affirming grant of summary judgment on bank's claims against insurer after insurer promised to

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[2] The investment agreements between Plaintiffs and Tiberius are not before the Court. Presumably any claim that Tiberius owed money to Plaintiffs would arise under the redemption terms of these contracts, so the extent of Tiberius's obligation to repay any amount or over what time frame is not clear from the record.

[3] At the hearing, Plaintiffs conceded the 2009 Contract did not meet the statutory requirements of a guarantee.

include bank as loss payee when issuing a check to its insured but failed to do so because the promise was given without consideration). The Court finds the *Lee v. Choi* case instructive. *Lee*, 754 S.E.2d at 376. The agreement at issue in *Lee* was one to pay Choi $450,000 for work he had already performed for the Lees. The Court granted the Lees' summary judgment on a breach of contract claim due to lack of consideration. Choi argued the promise to pay was a settlement agreement that was a compromise regarding a disputed claim. The Court rejected this argument, noting that there was no language in the four corners of the contract revealing a disputed claim or disagreement. *Id.* Similarly, in this case, there is no language in the four corners of the contract that indicates Mr. Dadlani's promise to pay was in exchange for forbearance, for what time period, or for what claims, or that the agreement was intended to settle a dispute. Nothing in the 2009 Contract refers to forbearance or prevents Veena from pursuing claims. Furthermore, Veena testified that at the time she signed the 2009 Contract she did not have any intention of taking legal action. As such, the Court finds the 2009 Contract fails for lack of consideration.

B. Veena was not acting as an actual or purported agent of Felipe.

Felipe is not mentioned anywhere in the 2009 Contract and there is no express indication Veena was signing the 2009 Contract on behalf of Felipe, either directly or as an intended third party beneficiary. No separate corporate representative signed on behalf of Felipe. Veena testified her husband, BK, authorized her to sign on behalf of Felipe, but BK is not a director, officer, shareholder, or trustee of Felipe and it is unclear how BK as an ultimate beneficiary is authorized to appoint agents on the company's behalf. There is no sufficient evidence Veena had ever been authorized to act on behalf of Felipe before the 2009 Contract.

Plaintiffs argue that even if Veena was not an agent, actual or otherwise, Felipe subsequently ratified the 2009 Contract by bringing the breach of contract claim. See *MacDonald v. Harris*, 265 Ga App. 131, 133 (2003) (noting that a principal can ratify an unauthorized action of an agent or purported agent by bringing legal action based on the unauthorized act with full knowledge of the material facts). The Court is not persuaded by this argument because as discussed above, Veena was not purporting to enter the 2009 Contract for the benefit of Felipe, and on the face of the 2009 Contract, no benefit flowed to Felipe. The 2009 Contract notes two investments that are to be repaid, but does not clarify to whom. Therefore, any subsequent ratification would be of no consequence to Felipe because Felipe is not promised any benefit. As such, the claim for breach of the 2009 Contract fails.

For the reasons discussed above, the 2009 Contract is unenforceable, and Defendant's motion for summary judgment on the claim for breach of the October 9, 2009 contract is **GRANTED** and Plaintiffs' motion for summary judgment on the count is **DENIED.**

II. Breach of the 2010 Contract

Likewise, Mr. Dadlani asserts the 2010 Contract is unenforceable for many of the same reasons and therefore the breach of the 2010 Contract claim brought by Plaintiffs Viken, Felipe, Veena and Soniya fail as a matter of law.

A. The 2010 Contract Lacks Bargained-For Consideration.

Plaintiffs again argue the consideration bargained for was Plaintiffs' promise to (1) forego legal action against Mr. Dadlani and Tiberius BVI; (2) discount the amount to be repaid to Plaintiffs for their investments; and (3) give Mr. Dadlani and/or Tiberius BVI more time to repay. Again, nothing on the face of the 2010 Contract prevents any of the Plaintiffs from bringing suit against Dadlani or Tiberius BVI. Indeed, Plaintiffs filed the action in the UK in

February of 2011 even though payment from Tiberius to Soniya was not due until the end of March. Therefore, the Court is not persuaded a promise to forego legal action was valid consideration or even a term of the 2010 Contract.

Likewise, there is no indication an extension to repay or a discounted amount to repay was the intended consideration for the 2010 Contract. There is no indication that Mr. Dadlani was under any obligation to pay on behalf of Tiberius who managed the investments, leaving a naked, voluntary promise by Mr. Dadlani to repay the debts of others, even assuming such debt existed.

B. Veena and Mr. Dadlani were acting individually and not as purported agents.

Next, Plaintiffs argue Mr. Dadlani is personally liable for the debts for holding himself out as the agent of Tiberius under O.C.G.A.§ 10-6-85. Although the 2010 Contract is styled "Agreement Reached between Mrs. V.B. Mirchandani and Navin Dadlani," the 2010 Contract promises various actions by Tiberius and Peach Trust for the benefit of Felipe, Viken, Veena and Soniya. However, there is no evidence Veena mistook Mr. Dadlani as Tiberius's agent or the trustee of the Peach Trust when she entered into the agreement with Mr. Dadlani. Veena testified that the 2010 Contract was "between Navin and me" and had "nothing to do with Tiberius." Indeed, upon hearing about the 2010 Contract, a representative of the Peach Trust wrote Veena in May of 2010 to inform her Mr. Dadlani was not an authorized agent of Tiberius and was not authorized to enter into the 2010 Contract.

Finally, as discussed above, there is insufficient evidence Veena was authorized to bind Felipe, Viken, and Soniya to the 2010 Contract. There is no evidence Veena had ever been authorized to act on behalf of the corporate entities in the past, nor for purposes of entering into

the 2010 Contract, or that BK had the authority to authorize her to enter into contracts on behalf of the corporate entities.

As such, Defendant's motion for summary judgment on the claim for breach of the March 17, 2010 contract is **GRANTED** and Plaintiffs' motion for summary judgment on the claim is **DENIED.**

III. Promissory Estoppel

Plaintiffs, in the alternative to their breach of contract claims discussed above, assert they relied on the promises and representations in the 2009 and 2010 Contracts to their detriment. "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." O.C.G.A. §13-3-44. "Detrimental reliance which causes a substantial change in position will constitute sufficient consideration to support promissory estoppel." *Balmer v. Elan Corp.*, 261 Ga. App. 543, 545 (2003) aff'd, 278 Ga. 227(2004) (citations omitted). "Promissory estoppel does not apply to a promise that is vague, indefinite, or of uncertain duration." *Mariner Healthcare, Inc. v. Foster,* 280 Ga. App. 406, 412 (2006). The statute of limitations for a promissory estoppel claim is four years. See O.C.G.A. § 9-3-25.

Plaintiffs concede that the claim for promissory estoppel based on the repayment of $ 8 million in the 2009 Contract is time-barred because the money was due and not paid more than four years from filing the claim. However, Plaintiffs ask the Court to consider the 2009 Contract as an installment contract and to separately consider the part of the 2009 Contract requiring repayment of $14.5 million which did not need to be paid for a year, or October 17, 2010, as within the four year statute of limitation.

Plaintiffs allege that in reliance on Dadlani's representations, they delayed bringing immediate legal action, did not make redemption requests from 2009 to 2013 and their ability to recover decreased over this time because the value of the investments continue to decline and several claims were now barred by the statute of limitations. Conversely, Mr. Dadlani asserts there is no evidence Plaintiffs changed their position in reliance to the promises made in the 2009 and 2010 Contracts or, if they did, the change in position caused them harm. There is no evidence that any Plaintiff relied on Mr. Dadlani's promises in the 2009 and 2010 Contracts to their detriment. Veena testified that at the time she signed the 2009 and 2010 Contracts she had no intention to sue so there is no evidence Veena changed her position in reliance on the 2009 and 2010 Contracts. Further, the Court is not persuaded Plaintiffs did not make redemption requests in reliance on Mr. Dadlani's promises. First, Plaintiffs were notified Vision Fund had "gated" and redemption requests were not being fulfilled in March of 2009. Second, Plaintiffs were informed in July of 2010 by Tiberius that Tiberius had made a redemption request for the entire amount invested in the Vision Fund so a redemption request by the Plaintiffs would have been futile. Thus, the Court agrees there is no evidence Plaintiffs changed their positions to their detriment in reliance on Mr. Dadlani's promises to pay or that Plaintiffs' reliance caused further harm to their investments that could otherwise have been avoided. As such, Defendant's motion for summary judgment on the claim for promissory estoppel is **GRANTED.**

IV. Breach of Fiduciary Duties

Plaintiffs allege Mr. Dadlani, as Plaintiffs' broker and financial advisor, breached his fiduciary duties of good faith and loyalty because he knew the Vision Fund was "dead" by May of 2009, but withheld the information from Plaintiffs. "Any relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one

party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc." O.C.G.A. § 23-2-58. "Although a confidential relationship may exist between businessmen in some situations, in the majority of business dealings no confidential relationship is created merely because the parties have trust and confidence in each other's integrity." *Royal v. Bland Properties, Inc.*, 175 Ga. App. 250, 251 (1985) (citing *Cochran v. Murrah*, 235 Ga. 304, 306 (1975); *Lewis v. Alderman*, 117 Ga. App. 855(1) (1968)).The existence of family relationships is insufficient to establish a confidential relationship. *First Am. Bank v. Bishop*, 244 Ga. 317, 319 (1979) (evidence showing that bank officer was brother of plaintiff's daughter-in-law, solicited plaintiff and induced him to place his business with the bank, and promised to keep his affairs confidential and to treat plaintiff right was insufficient to create a confidential relationship).

Plaintiffs acknowledge in their Complaint that, as Tiberius BVI investors, they received regular updates and information regarding their accounts throughout the life of their investments regarding how the fund was performing and the value of their investments at least until September of 2010 as required under the terms of Felipe and Viken's investment management agreements with Tiberius. Renewed Compl. ¶¶ 39-41. While Plaintiffs may have had great confidence in their cousin and nephew, Mr. Dadlani, the evidence is undisputed that Plaintiffs are sophisticated investors and relied on advisors other than Mr. Dadlani. And, ultimately, the money was invested with Tiberius, not Mr. Dadlani personally. In the absence of evidence of a confidential relationship, the claim for breach of fiduciary duties must fail.

Alternatively, the breach of fiduciary duty claims are time-barred. *See Godwin v. Mizpah Farms, LLLP,* 330 Ga. App. 31 (2014) (applying four year statute of limitations to breach of

fiduciary claims arising under statutory or common law); *Hendry v. Wells*, 286 Ga. App. 774, 779 (2007) (applying four year statute of limitations under O.C.G.A. § 9-3-31 to breach of fiduciary duty claims). Plaintiffs argue Mr. Dadlani breached his duty by actively concealing information about the Vision Fund's status from Plaintiffs as late as 2011. First, Plaintiffs rely on a May 7, 2011 letter from Mr. Dadlani to his Uncle Mathani as evidence that he was actively concealing information about the Vision Fund's status from Plaintiffs. In this letter, Mr. Dadlani states that "The Vision fund is dead. I do not believe that fund will make any more money, nor do I believe it will get above high water mark." He called the fund a "worthless vehicle." He then asked his uncle not to share the information with other family members. Second, Plaintiffs rely on a letter to Randolph Cohen on May 11, 2011, one of the owners of the Vision Fund, in which Mr. Dadlani states that he was able to "shield the fund from any harm" for two full years since the fund gated by "holding off the family for as long as possible," but could no longer hold them off. They argue that this letter is evidence that Mr. Dadlani's loyalty was with the fund and not with the family members despite his fiduciary duties to them.

The Court is not persuaded that a confidential relationship, even if initially formed, still existed in 2011. The evidence is clear Plaintiffs were receiving updates through Tiberius, including information about the fund gating in March of 2009. The parties were adverse to one another by 2009 when Tiberius could no longer honor redemption requests made by Plaintiffs and Veena began negotiating the terms of the 2009 Contract with Mr. Dadlani, so even if a confidential relationship was formed in 2005 between the parties through the initial investments made by Plaintiffs in Tiberius, the relationship ended once the parties were adverse to one another. As such, Defendant's motion for summary judgment on the claim for breach of fiduciary duty is **GRANTED.**

V. Punitive Damages and Attorneys' Fees

"The derivative claims of attorney fees and punitive damages will not lie in the absence of a finding of compensatory damages on an underlying claim." *D.G. Jenkins Homes, Inc. v. Wood*, 261 Ga. App. 322, 325 (2003) (citing *Wade v. Culpepper*, 158 Ga. App. 303, 305 (1981)). As such, Defendant's motion for summary judgment on the claims for punitive damages and attorneys' fees is **GRANTED.**

SO ORDERED, this 13th day of May, 2015.

THE HONORABLE MELVIN K. WESTMORELAND,
SENIOR JUDGE
Fulton County Superior Court – Business Case Division
Atlanta Judicial Circuit

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